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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TWB-204
Washington, DC 20554

Re: Notice of Written Ex Parte Communication, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98 and 98-147
*** Public Version ***

Dear Ms. Dortch:

SBC has claimed that because AT&T self-provides a significant proportion of its own DS3 "tails" that connect to its local backbone rings, that fact alone warrants broad-scale de-listing of virtually all high capacity loops as unbundled network elements. SBC's superficial analysis must be rejected, because it ignores the other market realities that AT&T and others have provided on the record, including the following:

(1) ***The Referenced DS3 Tail Circuits Are A Small Fraction of the Relevant Universe*** - The DS3 "tails" identified by AT&T relate to a small base of facilities that covers only the narrow situations in which the combined demand for local voice, local data and access services from a specific location warrants consideration of whether to build fiber-based facilities capable of supporting DS3 (or higher capacity) services, *i.e.* a total demand of about 3 DS3s.¹ The total universe of DS3 tails is relatively small (about 16,000); and AT&T has itself self-deployed slightly more than half of those facilities, spread across more than 60 metro markets. This evidence is fully consistent with AT&T's demonstrations in this record that where ever and whenever a facilities build is economically justified, AT&T will deploy its own facilities.

Critically, the number of DS3 tail *circuits* sold does *not* equate to the number of physical *facilities* built to customer premises. As AT&T has previously shown, when a

¹ *Ex parte* letter from Joan Marsh dated November 25, 2002 ("Marsh *ex parte*"), Attachment B.

CLEC is considering whether to build “tail” facilities *from its local backbone ring* to a customer’s premises, it will generally require almost 3 DS3s worth of total demand to justify the construction, where the other conditions required to justify a build (e.g., prompt, cost-based access to necessary rights-of-way and buildings, reasonable proximity of the customer location to the backbone facility) are satisfied.² And even though a customer may require about 3 DS3 tail circuits, the entire service is provided over a *single fiber*. Accordingly, the number of tail *circuits* that AT&T reported represents about *three times* the number of *buildings* that are actually connected to AT&T’s network. This is fully consistent with AT&T’s evidence that it has only been successful in placing about 6,000 locations “on-net” across the entire country where such DS3 tails are sold to the customer. Those AT&T on-net buildings represent about 10% of the 50,000 to 60,000 locations that theoretically could justify building new high capacity loop facilities. Thus, AT&T has *not* been able to reach *about 90%* of those “target” buildings using entirely its own (or competitive) facilities. And as AT&T has also shown, because of restrictions imposed by landlords, AT&T is not even entitled to use its own facilities to serve all of the customers in the vast majority of the buildings it has actually reached with its own DS3 “tails”.³ Thus, it still needs to access to unbundled high capacity loops to serve other customers in buildings that are already connected to its own network. Indeed, AT&T’s experience also shows that ILEC facilities must also be used to serve customers in a very substantial portion of the buildings where AT&T has built its own loop facilities (*i.e.*, has the building on-net).⁴

(2) ***The Minimal Evidence Relating to the Ability to Self-Provision DS3 Tails Is Irrelevant To Lower Capacity Circuits*** - Virtually the entirety of AT&T’s more than one million tail circuits *below* the DS3 level are ILEC provided. Ninety one percent of its DS0 tails and eighty six percent of its DS1 tails are provisioned by ILECs. AT&T’s experience is not dissimilar to that of other CLECs that have reported comparable data. Thus, there is no evidence at all that any competitor could self-provision DS1 (or lower capacity) tails, because such locations do not even approach the level of total demand necessary to consider self-provisioning, and for the loops delivering DS1 and lower capacities, the CLEC impairment is extreme.

(3) ***A CLEC’s Ability to Self-Provision Loops Cannot Be Assessed in a Vacuum*** - Self-provisioned loops are almost always provisioned as *extensions* to otherwise justified metropolitan transport facilities that are self-provided. Said another way, transport rings are built first and then, where justified, loops are extended to buildings, or building rings are attached to the transport ring. The converse is not true. Thus, a CLEC

² *Id.* “Tail” circuits only run between a CLEC’s metro fiber ring and a customer premises. As discussed below, a CLEC would virtually never consider building a loop from a customer location to any other location. Thus, tail circuits do not include any “traditional” loops that connect customer premises to ILEC central offices.

³ See, e.g., AT&T Comments at 146, Leshner-Frontera Declaration, ¶ 42; AT&T Reply Comments at 176.

⁴ Leshner-Frontera Declaration ¶ 42.

will *not* consider self-providing DS3 loops⁵ unless local conditions have also supported the construction of its own local transport facilities. And as AT&T has showed, a CLEC cannot economically justify the construction of a metro fiber transport ring unless it is able to provide about 18 DS3s of traffic at each node on the ring.⁶ Thus, economic loop construction is intimately related to the existence of sufficient demand for transport in an area. And critically, commingling and use restrictions, which limit CLECs' ability to aggregate demand at hubs, not only reduce competitive local fiber ring deployment but also deter competitors' ability to construct loops.

(4) ***The Market for Deployment of Competitive High-Capacity Facilities is Mature*** – A competitor's opportunity to address buildings with non-ILEC high capacity facilities is also limited, because the market for deploying such facilities is mature. Much of the competitive build-out of alternatives to the ILECs' high capacity facilities occurred even before passage of the 1996 Act. Furthermore, as acknowledged by the Commission, the ILECs have extensive local fiber deployment and, when the fiber was deployed, substantial unused capacity was also installed. Thus, the number of instances in which there is an overlap between previously unaddressed high demand locations and positive conditions for building (building access, proximate transport ring capacity, practical rights of way access, etc.) is now relatively small. Indeed, even in New York, one of the most densely penetrated markets for competitive facilities, the New York PSC found that in LATA 132, which includes New York City, Verizon served *over seven times* the number of buildings using fiber facilities as all competitors combined.⁷ Thus, even after more than a decade of attempted competitive construction, it is clear that the ILECs have a large majority share of the high capacity facilities used to serve the prime "big" buildings, and a virtual monopoly with respect to access to the almost 3 million other commercial buildings that are not addressable through a competitive facilities build.

(5) ***Failure to Permit Competitive Access to High Capacity Facilities as UNEs Risks ILEC Remonopolization*** - Given the pervasive 271 authority that has been granted since the *UNE Remand Order* was issued, together with the recent aggressive RBOC efforts to de-regulate broadband services, elimination of competitive access to high capacity facilities as UNEs will likely result in the RBOCs' monopolization of the data services provided to medium- to large-sized business locations. Absent unbundling of high-capacity loops and transport, the incumbents will have the means and the incentive to apply "market-based" pricing that provides their competitors with only two options: (a) not

⁵ CLECs would never consider constructing their own DS1 or lower capacity loops. See AT&T Reply Comments at 159 (explaining that DS1 loops are typically provided using the same physical plant as ordinary copper loops).

⁶ Marsh *ex parte*, Attachment A.

⁷ Case 00-C-2051, *Proceeding to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York, Inc.*, issued June 15, 2001 at 7 (also finding that Verizon has over 8,000 miles of fiber facilities in that LATA "compared to a few hundred for most competing carriers"); see also New York State Department of Public Service Comments at 5 (opposing elimination of high capacity loops as UNEs and stating that "[e]ven in lower/midtown Manhattan, Verizon facilities (wholesale and retail) serve over half of all special access service circuits" and that "in upstate New York, Verizon facilities serve almost 90% of such circuits").

serving the customer because they cannot self-supply tail circuits and transport at competitive cost levels; or (b) paying excessive and non-cost-based prices for loops/transport that transfer virtually all the profitability of the entire service to the ILEC. In addition, without the ability to serve high volume locations, potential competitors will lack the ability to build scale and generate free cash that permits them to extend their facilities to serve down-market segments.

(6) ***AT&T's Data are Consistent*** - Finally, AT&T's data relating to the availability of alternatively provided tail circuits reinforce the fact that almost 3 DS3s of demand are required to "prove-in" a decision to build a loop in cases where the backbone facility exists to connect with a customer location, assuming that the other conditions required to justify a build are satisfied. AT&T's earlier *ex parte* demonstrated that, on average, a building would not prove attractive for a loop build – assuming that a transport ring already existed -- unless there were at least 77 DS1 equivalents of service required. Converting the latter figure to DS3 equivalents (*i.e.*, dividing by 28) shows that 2.75 equivalent DS3s are required.⁸ As corroboration of this figure, AT&T examined the services sold to on-net locations. *** Proprietary information *** Dividing total DS3 services sold to on-net locations by the number of active buildings on AT&T's metro ring, the numbers demonstrate that, on average, AT&T actually delivered between 2.62 and 2.88 DS3 equivalent tails per "on-net" building. The data supporting this calculation will be provided in a separate proprietary *ex parte*.

In sum, the question of impairment with respect to high capacity loops is two-pronged: (1) Does the requesting carrier have the practical opportunity to serve at least 3 DS3s worth of equivalent demand at the identified location, and (2) Can the carrier practically and economically connect the location to its existing local transport network using its facilities? Unless the answers to both questions are "yes," there is no reason to believe that the requesting carrier will be able to profitably provide facility-based retail services using its own high capacity loops. Thus, the mere fact the AT&T may have been successful in addressing *some* buildings with "on-net" DS3 tail circuits does not demonstrate that AT&T – or any other carrier – can deploy its own facilities to serve *other* customers in *other* locations.

Consistent with Commission rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-referenced proceedings.

Sincerely,

A handwritten signature in black ink, appearing to be 'JM' followed by a horizontal line, representing Joan Marsh.

Joan Marsh

cc: Thomas Navin
Jeremy Miller

⁸ Marsh *ex parte*, Attachment B.